BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT K. SCHEIDT	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,003,641
TEAKWOOD CABINET & FIXTURE INC.	)	& 1,021,836
Respondent	)	
AND	)	
	)	
OHIO CASUALTY INSURANCE COMPANY and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant appeals the March 21, 2008 Award of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded benefits for a 21.5 percent permanent partial work disability for the injuries suffered in a series of accidents through March 1, 2005, in Docket No. 1,021,836, but denied a review and modification of claimant's original running award in Docket No. 1,003,641.

Claimant appeared by his attorney, John L. Carmichael of Wichita, Kansas. Respondent and its insurance carrier Ohio Casualty Insurance Company appeared by their attorney, Michael P. Bandre of Overland Park, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company appeared by their attorney, Heather E. Hutsell appearing for Samantha N. Benjamin-House of Kansas City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At the oral argument to the Board, claimant's attorney noted the fringe benefit information for claimant's average weekly wage from when he worked for respondent, contained in his brief, was incorrect. The correct fringe benefit amount of $126.93 per week was stipulated to by the parties. This corrected amount will be utilized by the Board in the final calculation of this award. Additionally, at oral argument to the Board, the parties stipulated that the appeal in this matter was only in Docket No. 1,003,641. The award in Docket No. 1,021,836 was no longer disputed by claimant and the Award of the ALJ in that matter should, therefore, be affirmed. In his brief to the

Board, claimant refers to his discovery deposition of October 5, 2005. However, the transcript of that deposition is not contained in the Board's file and is not included in the Award as part of the record. The Board heard oral argument on June 20, 2008.

ISSUES

1. The specific issue raised by claimant, in his application to the Board in Docket No. 1,003,641, is whether claimant is entitled to permanent partial disability compensation on the basis of a work disability, and if so, the nature and extent of that disability. This matter was originally settled on a "running award" on November 5, 2002. At that time, claimant was awarded a whole body functional award of 22.5 percent, with future medical benefits and the right to review and modify the award being left open. Claimant last worked for respondent on March 1, 2005. A motion for review and modification was filed on March 10, 2005. Claimant argues that, pursuant to K.S.A. 44-528, his condition has changed and he is now entitled to a "work disability" (a permanent partial disability in excess of claimant's functional impairment) under K.S.A. 44-510e.

2. If claimant has proven that his condition has changed and he is entitled to a permanent partial general disability under K.S.A. 44-510e, what is the nature and extent of that disability? More particularly, what task loss and wage loss has claimant suffered as the result of claimant's layoff from respondent?

3. Respondent contends claimant's award should be reduced to two scheduled injuries pursuant to the Kansas Supreme Court's decision in *Casco*.[1] Claimant contends that *Casco* cannot be applied to this matter as the original determination in the running award that claimant suffered a whole body disability is controlling based on "the law of the case" doctrine and/or "res judicata".

FINDINGS OF FACT

Claimant was employed by respondent from January 1985 until March 1, 2005. Claimant's job with respondent was as a working shop foreman. His duties included performing supervisory duties as well as helping with production. This involved building

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

and installing cabinets, sanding, and moving cabinets. Claimant suffered injuries to his upper extremities while so employed. These injuries led to the running award on November 5, 2002, when claimant was awarded a 22.5 percent permanent partial general disability. That award was based in part on the 25 percent whole body rating of board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D. Dr. Murati also placed permanent work restrictions on claimant of no climbing ladders, no crawling, rarely heavy grasping, occasional repetitive grasping/grabbing, no above shoulder work, no lifting, carrying, pushing or pulling over 50 pounds, no working over 24 inches from the body and no use of hooks, knives or vibratory tools.

Claimant returned to work for respondent, earning at least 90 percent of his pre-injury wages. Also, when claimant returned to work for respondent, he regularly exceeded Dr. Murati's restrictions. As a result of this ongoing workload with respondent, claimant's condition continued to worsen. Claimant filed a separate workers compensation claim and received an award in Docket No. 1,021,836 for the worsening condition. That award is not part of this appeal. Claimant also filed a motion for review and modification in Docket No. 1,003,641, alleging that his condition had changed, thus entitling him to an increase in the running award. Claimant argued that, due to the layoff when respondent's factory closed, his condition had clearly changed. Thus, claimant is entitled to a review and modification of his claim under K.S.A. 44-528.

Claimant was laid off by respondent when the plant closed on March 1, 2005. He obtained work with Boone's Cabinets (Boone's) beginning March 7, 2005. Claimant earned a weekly salary of $461.11 while working for Boone's. This post-injury wage amount is not disputed by the parties. He was laid off from Boone's on October 5, 2006, when Don W. Boone, the owner of Boone's, closed his shop. During some of the time claimant worked for respondent, and the entire time claimant worked for Boone's, claimant also was engaged in a lawn care business as an owner. After claimant was laid off from Boone's, he began working the lawn care business full time. As of May 1, 2007, claimant's lawn care business obtained a significant contract with the City of Wichita. The parties stipulate that as of that date, claimant began earning wages comparable to those he earned with respondent. Thus, any "work disability" would end on that date and claimant would be entitled to only the original functional impairment from the running award. As that award has fully paid out, claimant's entitlement to added permanent disability benefits under K.S.A. 44-510e would cease on May 1, 2007.

At the time of claimant's 2001 injury, he was a salaried employee of respondent, receiving $1,226.53 every two weeks. This calculates to a weekly wage of $613.27. As noted above, claimant was also receiving fringe benefits valued at $126.93 per week. This calculates to a weekly wage of $740.20 while working for respondent. When claimant went to work for Boone's, he earned a weekly wage of $461.11. This wage, when compared to claimant's wage at respondent of $740.20, calculates to a wage loss of 38 percent.

Dr. Murati was provided a task list created by vocational expert Jerry Hardin. This list contained 33 tasks of which, per the opinion of Dr. Murati, claimant was unable to perform 20, for a task loss of 61 percent. The ALJ, in Docket No. 1,021,836, rejected this task loss opinion because claimant had not informed Mr. Hardin of his work activities in the lawn mowing business. The ALJ ruled that this missing information rendered Dr. Murati's task loss opinion invalid. Claimant's award in that docketed case was calculated without a task loss percentage. Here, the record does not indicate that claimant performed the lawn mowing business before his April 3, 2001 date of accident. Therefore, the task list without the lawn mowing tasks would be accurate.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

K.S.A. 44-528, the review and modification statute, allows for a modification of an award if,

> . . . the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished . . . .[5]

Claimant argues that his permanent partial disability changed with the layoff from respondent's plant. Therefore, there is justification to review and modify the original

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[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

[5] K.S.A. 44-528(a).

running award. Respondent argues that claimant continued working for respondent for four years after suffering the initial injury. During this time, claimant earned 90 percent or more of his average weekly wage, which, pursuant to K.S.A. 44-510e, would limit claimant to his functional impairment. It was only after suffering additional injuries through his last day worked and only after an economic layoff due to respondent's plant closing that claimant lost his job with respondent. The Kansas Court of Appeals, in *Lee*,[6] answered the question regarding an economic layoff. Although dealing with the predecessor to the current version of K.S.A. 44-510e, the policy set forth by the Court in *Lee* applies to this matter as well.[7] The *Lee* Court stated that it was not the "intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere".[8] Here, claimant continued working for respondent until the plant closed and claimant was laid off. Pursuant to K.S.A. 44-528, this constitutes a change in claimant's work disability sufficient to justify added disability.

Respondent also argues that the law as clarified by *Casco*[9] applies in this review and modification proceeding. Respondent contends that the original determination of claimant's injuries contained in the running award should be modified to limit claimant's award to two scheduled injuries rather than the original 22.5 percent whole body impairment. In *Casco*, the Court was asked to consider the appropriate method of calculating an award when dealing with injuries to parallel extremities.

Claimant contends that *Casco* cannot be applied based on the doctrines of res judicata and law of the case. Res judicata states "that when a matter in issue has once been determined, it is not subject to a redetermination; that it is entitled to the recognition of permanence and constancy always accorded a judgment."[10]

Respondent argues that the 22.5 percent impairment to the body used to settle this matter should be modified to two scheduled injuries pursuant to the Supreme Court's decision in *Casco*. The Court, in *Casco*, clarified prior interpretations of the Kansas Workers Compensation Act, ruling that bilateral extremity injuries should be compensated as separate scheduled injuries and not as an injury to the body as a whole. The law did

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[6] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

[7] See *Tallman v. Case Corp.*, 31 Kan. App. 2d 1044, 77 P.3d 494 (2003).

[8] *Id.* at 365, Syl. ¶ 3.

[9] *Casco, supra.*

[10] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 395, 510 P.2d 1190 (1973).

not change, only the way the existing law is interpreted. In this case, there was an agreement at the time of the settlement that claimant had a 22.5 percent impairment to the whole body. That Award was not appealed. That is a finding of a past fact which existed at the time of the original settlement. It became final for want of an appeal and is not subject to a redetermination. The doctrine of res judicata applies to the determination that claimant's impairment is to the body as a whole.

Claimant also raises the legal principle that the determination of a whole body impairment is "the law of the case".

> [the] doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process.[11]

The Board acknowledges that the Kansas Court of Appeals has determined that *Casco* shall be applied to all workers compensation cases pending when *Casco* was decided.[12] The claimant, citing *Myers*, argued that the law in *Casco* should not be applied retroactively as the Board's decision in *Myers* was issued on March 15, 2007, and the *Casco* decision was not handed down until March 23, 2007. However, a Petition has been filed in *Myers*, requesting Supreme Court review. No decision on that request has been handed down as of the issuance of this Order. Therefore, citing *Myers* would be inappropriate. Factors set forth in *Vaughn*[13] aid in determining whether an overruling decision should be applied retroactively. The factors considered included:

> (1) Justifiable reliance on the earlier law; (2) The nature and purpose of the overruling decision; (3) *Res judicata*; (4) Vested rights, if any, which may have accrued by reason of the earlier law; and (5) The effect retroactive application may have on the administration of justice in the courts."[14]

While the *Vaughn* principles supported a retroactive application of *Casco*, the Board does not agree to that application in this instance. Here, the determination that claimant suffered a whole body impairment was agreed to over four years before *Casco*. The

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[11] *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 150 P.3d 892 (2007); citing *State v. Collier*, 263 Kan. 629, Syl. ¶ 2, 952 P.2d 1326 (1998).

[12] *Myers v. Lincoln Center OB/GYN*, P.A., ___ Kan. App. 2d ___, 180 P.3d 584 (2008).

[13] *Vaughn v. Murray*, 214 Kan. 456, 521 P.2d 262 (1974).

[14] *Id.* at 464.

retroactive application of *Casco* here would result in a serious injustice to claimant. Additionally, claimant's vested right here to a whole body impairment has been fully satisfied.

For the above reasons, the Board finds the determination, as agreed by the parties at the time of the running award, that claimant suffered a 22.5 percent whole body impairment should not be modified. The Board further finds that claimant's layoff from respondent constitutes an increase in claimant's work disability pursuant to K.S.A. 44-528. Therefore, claimant is entitled to a permanent partial work disability pursuant to K.S.A. 44-510e.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[15]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[16] and *Copeland.*[17] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[18]

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[15] K.S.A. 44-510e.

[16] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[17] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[18] *Id.* at 320.

The ALJ, in the decision in Docket No. 1,021,836, determined that claimant had put forth a good faith effort in attempting to find a job after his layoff from respondent. The ALJ went on to use the wage claimant earned at Boone's when computing claimant's permanent partial disability. The ALJ then determined that claimant had not put forth a good faith effort in trying to obtain a job after his layoff from Boone's. The ALJ then imputed the same wage claimant was earning at Boone's for the period after the Boone layoff. The Board finds that this same philosophy applies to this matter. Claimant, after the layoff from respondent, immediately found similar employment with Boone's, doing similar, although lighter, work. This would, in the Board's mind, constitute a good faith effort to obtain employment. Therefore, the utilization of the Boone wage for the period claimant was so employed satisfies the provisions of K.S.A. 44-510e and the policies in *Foulk* and *Copeland*. For the period after the Boone layoff, claimant worked with his lawn mowing business, but provided little information regarding the income he derived from that employment before May 1, 2007. This does not satisfy the good faith requirements of *Copeland,* and the Board will also apply the Boone wage to this period as a proper determination of claimant's ability to earn wages. In comparing the Boone wage of $461.11 to the respondent average weekly wage of $740.20, the Board finds a wage loss of 38 percent.

The Board must next consider the task loss suffered by claimant in this matter. The task loss opinion of Dr. Murati which uses the task list of Jerry Hardin does not contain tasks from claimant's job with the lawn mowing business. First, there is no information in this record that claimant was performing the lawn mowing business in the fifteen years preceding the first date of accident on April 3, 2001. Additionally, the lawn mowing business before claimant's layoff from Boone was a very part-time employment. The Board does not find that employment to constitute substantial and gainful employment, as is required under K.S.A. 44-510e(a). Therefore, the 61 percent task loss opinion of Dr. Murati is found to satisfy the requirements of K.S.A. 44-510e and will be utilized in the calculation of claimant's permanent partial work disability. In averaging the 38 percent wage loss with the 61 percent task loss, the Board finds claimant has suffered a permanent partial work disability of 50 percent. Claimant's work disability will become effective as of March 2, 2005, the day after his layoff from respondent, and will end as of April 30, 2007, the day before the contract with the City of Wichita begins.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ in Docket No. 1,003,641 should be modified to award claimant a 50 percent permanent partial work disability effective March 2, 2005, and concluding April 30, 2007. Respondent will be given credit for the 22.5 percent permanent partial whole body functional impairment already paid claimant in this matter.

AWARD

DOCKET NO. 1,003,641

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes in Docket No. 1,003,641 dated March 21, 2008, should be, and is hereby, modified to award claimant a 22.5 percent permanent partial whole body impairment pursuant to the agreed award of November 5, 2002, followed by a 50 percent permanent partial whole body work disability effective March 2, 2005, and ending April 30, 2007.

An award of compensation is made in favor of the claimant, Robert K. Scheidt, and against the respondent, Teakwood Cabinet & Fixture Inc., and its insurance carrier, Ohio Casualty Insurance Company, for an accidental injury which occurred on April 3, 2001, and based upon an average weekly wage of $740.20 and a compensation rate of $401 per week, for 93.38 weeks of permanent partial disability compensation at the rate of $401 per week totaling $37,445.38 for a 22.5 percent permanent partial disability, followed by 112.86 weeks of permanent partial disability compensation at the rate of $401 per week totaling $45,256.86 for a 50 percent permanent partial work disability, making a total award of $82,702.24. As of the date of this award, the entire amount is due and owing and is ordered paid in one lump sum less any amounts previously paid.

DOCKET NO. 1,021,836

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes in Docket No. 1,021,836 dated March 21, 2008, wherein an award of compensation was made in the favor of the claimant, Robert K. Scheidt, and against the respondent, Teakwood Cabinet & Fixture Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred on March 1, 2005, for a 21.5 percent work disability, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier Ohio Casualty Insurance Company
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier Liberty Mutual Insurance Company
Nelsonna Potts Barnes, Administrative Law Judge